No. 3764

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

J. L. NIDAY AND MOLLIE GREEN NIDAY, GEORGE A. BUELL AND EFFIE ADA BUELL, AND A. L. GREEN, *Appellants.*

vs.

JULIA GREEN GRAEF, *Appellee and Cross Appellant.*

PETITION FOR REHEARING

ALFRED A. FRASER,
Attorney for Appellants.

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To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit

Comes now the appellants, J. L. Niday and Mollie Green Niday and respectfully ask this Court to grant a rehearing in the above entitled suit for the following reasons:

That if the original opinion is permitted to stand it will establish a precedent for pleading in an equity suit in conflict with the decisions of the Supreme Court of the United States, of this Court and other Federal Courts.

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The appellants contend that the Bill of Complaint

in the above entitled action is insufficient as a bill of equity and the action should have been dismissed. This question has not been directly passed upon by the opinion of the Court in this case and was, and is, the main question relied upon by the appellants in this suit.

The appellants contend, and did contend that a bill in equity for the rescission and cancellation of a deed is not sufficient where the plaintiff has permitted any lapse of time to occur after knowledge of the facts constituting the cause of action, unless the bill sets forth in detail the excuse for delay and any reason, if any, which prevented the plaintiff from prosecuting the action, and the bill also, must contain an offer to restore to the defendants all property or money received and offer to place the defendants in statu quo. We believe that it is essential that both these requisites are set forth in the bill.

The Bill of Complaint in this action contains no statement of any fact or facts excusing or giving any reason for the delay of the complainant in bringing the suit, nor is there contained therein one word in which the complainant tenders or offers to repay the defendants the amount of money expended by them in paying off the mortgages, taxes, and other liens upon the property, and no offer of any kind or character is contained in said bill offering to place the defendants in statu quo.

This Court in its opinion in this case upon the question of laches is as follows:

> "We agree with the District Court that the appellant cannot successfully rely on the doctrine

of laches. It was not until April, 1918, that Mrs. Graef first learned of the existence of the deeds to Mr. Niday, and in January, 1919, litigation was commenced in the State Court of Idaho. Clearly, the defense of laches ought not to be sustained against her. The brother and sister who subsequently assigned their interests to Mrs. Graef, and who were originally co-plaintiffs with her, knew of the existence of the deeds within a short time after the death of Mr. Green; but the circumstances were not such as to make their delay unreasonable. As pointed out by the learned Judge of the District Court, the case is not one where one of the parties has permitted another to take all the chances of an enterprise and then after success has come demands a portion of the profits where he has been unwilling to share the risks. When the two original co-plaintiffs who assigned to Mrs. Graef learned of the existence of the deeds Mr. Niday did not offer to put them on an equality with him. If he had done so and they had failed to avail themselves of the offer, the argument invoking the doctrine of laches would have force; but under the circumstances of the instant case it has not. (Southern Pacific Co. vs. Bogert, 250 U. S. 483.)

The above statement by the Court has reference to the facts as developed by the evidence. It makes no reference whatsoever to the question of pleading and we contend that whenever the facts are sufficient to excuse the complainant's laches, the facts upon

which he relies for such an excuse must not only be developed by the evidence, but must be alleged in the pleading. If the complainant in this case had set forth in her Bill of Complaint the above facts as an excuse for the delay, then we would find no fault with the decision of this Court upon this question. But we again state that the facts excusing the delay must be alleged in the Bill of Complaint in order that the Court may say upon an examination of the pleading whether or not, as a question of law, the complainant has been guilty of laches. We have been unable to find any case in a Federal Court where a Bill of Complaint has been sustained where the complainant has been guilty of any delay in the commencement of the action after knowledge of the facts, unless such delay has been accounted for in the Bill of Complaint.

In one of the last cases decided by the Supreme Court of the United States; the case of Hays vs. Seattle, 251 U. S. 233 (citing on page 25 of our original brief), the Supreme Court says:

> "It is for the complainant in his bill to excuse the delay in seeking equitable relief, where there has been such; and if it is not excused, his laches may be taken advantage of either by demurrer or upon final hearing. Maxwell vs. Kennedy, 8 How. 210, 222 L. Ed. 1051, 1055; Badger vs. Badger, 2 Wall. 87, 95, 17 L. Ed. 836, 838; Marsh vs. Whitmore, 21 Wall. 178, 185, 22 L. Ed. 482, 485; Sullivan vs. Portland & K. R. Co., 94 U. S. 806, 811, 24 L. Ed. 324, 326; Mercantile Nat. Bank vs. Carpenter, 101 U. S. 567, 25 L. Ed. 815; Landsdale vs. Smith, 106 U. S. 391,

27 L. Ed. 219, 1 Sup. Ct. Rep. 350; Hammond vs. Hopkins, 143, U. S. 224, 250, 36 L. Ed. 134, 145, 12 Sup. Ct. Rep. 418; Galliher vs. Cladwell, 145, U. S. 368, 371-373, 36 L. Ed. 738-720, 12 Sup. Ct. Rep. 873; Hardt vs. Heidwever, 152 U. S. 547, 559, 38 L. Ed. 548, 552, 14 Sup. Ct. Rep. 671; Abraham vs. Ordway, 158, U. S. 416, 420, 39 L. Ed. 1036, 1039, 15 Sup. Ct. Rep. 894; Willard vs. Wood, 164, U. S. 502, 524, 41 L. Ed. 531, 540, 17 Sup. Ct. Rep. 176; Penn. Mut. L. Ins. Co. vs. Austin, 168 U. S. 685, 696-698, 42 L. Ed. 626, 630, 631, 18 Sup. Ct. Rep. 223."

The rule is again stated in Wood vs. Carpenter (cited on page 27 of our original brief) in which the Court says:

> "In this case the plaintiff is held to stringent rules of pleading and evidence. And especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the Court may clearly see whether, by ordinary diligence, the discovery might not have been before made."

In the case of Ward vs. Sherman, 192 U. S. 168, a case in which there was an unexplained delay of three and one-half years, the Court says:

> "It seems to us that the doctrine of laches applies with force and that upon the pleading the Court should have adjudged the defendant not entitled

to either rescision of the contract or to hold the vendee as a mortgagee in possession."

The one case cited in the original opinion of this Court upon this question of laches, Southern Pacific Co. vs. Bogert, 250 U. S. 483. In regard to this case we desire to say, that from an examination of the opinion in this case had in the trial Court it would appear that the facts excusing the delay were pleaded in the Bill of Complaint and that the complainant in that case had immediately upon the discovery of the fraud commenced an action for relief and had continuously prosecuted actions for a recovery and relief, and in the opinion of the Supreme Court then say:

"But the essence of laches in not merely lapse of time. It is essential that there be also acquiescence in the alleged wrongs or lack of diligence in seeking a remedy. Here the plaintiffs, or others representing them protested as soon as the terms of the reorganization agreements were announced and ever since they have with rare pertinacity and undaunted by failure persisted in the diligent pursuit of a remedy as the schedule of the earlier litigation referred to in the margin demonstrates."

Again in the case at bar in the opinion of this Court it is stated.

"It was not until April, 1918, that Mrs. Graef first learned of the existence of the deeds to Mr. Niday and in January, 1919, litigation was commenced in the State Court of Idaho. Clearly

the defense of laches ought not to be sustained as against her."

It is true that in the opinion of the trial Court the statement occurs that litigation was commenced in the State Court in January, 1919, however, the record is entirely silent as to when this litigation was commenced in the State Court and where the trial Court obtained this information the record does not disclose. However that may be, we know of no decision wherein any Court has held that the commencement and *subsequent dismissal* of an action would relieve a party from the charge of laches. In fact the decisions of the Court are to the contrary and it is held that the institution of a suit does not relieve a person from the charge of laches unless he proceeds with the *diligent prosecution* of that action.

In the case of Johnson vs. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. 585, the Court says:

> "It was not until April, 1885, more than a year after the Fulton Mining Company had obtained a patent to the property that he made formal demand upon Chatfield and on August 1, 1885, filed his first bill in the Circuit Court of the United States to establish his title to a quarter interest in the lode. This suit does not seem to have been prosecuted with much diligence, since it was allowed to linger for nearly a year and was then dismissed, apparently from want of jurisdiction appearing upon the face of the bill.
>
> "It has been frequently held that mere institution of suit does not of itself relieve a person

from the charge of laches and that if he fail in the diligent prosecution of the action the consequences are the same as though no action had been begun."

Willard vs. Wood, 164, U. S. 502.

Drees vs. Waldron, 212 Fed. 97.

It is shown by the record that the brother and sister who assigned their interests to the complainant knew of the execution and delivery of these deeds to the defendants, Niday, in the spring of 1917, immediately after the death of their father. The present suit was commenced March 23, 1920, a period of more than three years elapsed from the time they had knowledge of the transaction to the commencement of this suit and no reason or excuse is set forth in the bill for not more promptly commencing proceedings to set aside the transaction, a period of time sufficient to bar their right of action under the Statute of Limitations of this State. The records show that in the meantime the defendant Niday had paid out large sums of money in paying off mortgages, taxes, and other liens upon the property, that the property had doubled in value and had been sold to innocent purchasers by the efforts of the defendant. The Complainant now seeks to take the benefit of this advantageous sale without offering to do equity upon her part and the complainant herself as far as her individual interests in the property were concerned, conceding that she did not know of the transfer until 1918 (although the deeds were placed of record in 1916), delayed for a period of about two years and until after the sale of the property to innocent pur-

chasers before she took any steps to question the validity of the transaction. Under these circumstances we contend that she has no standing in a Court of Equity to question these transfers.

The rule applicable to these cases is stated in the case of Stuart v. Hayden, by the Circuit Court of Appeals of the Eighth Circuit, 72 Fed. 402 as follows:

> "If one who is induced to make a trade or sale by fraud would rescind it, he must immediately upon his discovery of the fraud, announce his intentions so to do, and return all the consideration he has received, to the end that the parties may be put in statu quo before subsequent transactions have made such action impossible. *Silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of the sale or trade that are capable of restoration, for any considerable length of time after discovery of the fraud, constitute a complete and irrevocable ratification of the transac-transaction.* (The italics are ours.) Rugan vs. Sabin, 10 U. S. App. 519, 531, 3 C. C. A. 578, 580, 53 Fed. 415; Kinne vs. Webb, 12 U. S. App. 137, 144, 4 C. C. A. 170, 174, 54 Fed. 34, 38; Scheftel vs. Hays, 19 U. S. App. 220, 226 7 C. C. A. 308, 312, 58 Fed. 457, 460; McLean vs. Clapp, 141 U. S. 429, 12 Sup. Ct. 29; Grymes vs. Sanders, 93 U. S. 55, 62."

Again it is stated in the opinion of this Court as follows:

> "When the two original co-plaintiffs who assigned to Mrs. Graef learned of the existence

of the deeds, Mr. Niday did not offer to put them on an equality with him. If he had done so and they had failed to avail themselves of the offer, the argument invoking the doctrine of laches would have force."

Counsel for the defendants contend that there was no evidence introduced to the effect that Mr. Niday did not offer to put the other heirs on an equality with him if they contributed in paying off the indebtedness against the property, but we contend that the record affirmatively shows that this very offer was made by Mr. Niday to the other heirs.

Plaintiff's Exhibit No. 3 is a copy of the letter written by Mr. and Mrs. Niday to the complainant in this action. This letter was placed in evidence by the complainant and it contains the following statement:

(Tr. page 150.)

"Now Jule when Father found he could not save his property he came to Mr. N—— and said he wanted him to take Greenhurst, if he thought he could save it, and you will remember that Niday asked Joe if he could contribute toward saving it, and take a proportionate interest, and stated to him that if we could hold on long enough real estate would come back, and you remember at that time farm as well as city property was but little in demand, in fact, no purchasers for it, but Joe said he simply could not; he did not have the money and it was either Niday or Dewey, as Dewey was going to foreclose. Niday also suggested

this to the rest of the children with the possible exception of Dr. Philo. The boys could not take it, so we raised the money at a time when Dewey was afraid he would have to take it and took a big chance, as we well knew it would have to be carried at a big loss each year we held it and that we could only hope to make up in an event of sale."

Plaintiff's Exhibit No. 4 is the copy of another letter admitted in the record to have been written and signed by the defendant Niday and received by the complainant in this action. This letter was also introduced in evidence by the complainant and contains the following statement:

(Tr. page 159.)

"I knew under the existing conditions that if Mr. Dewey started foreclosure proceedings that he would get the property, and I was in a position that I could handle it and he made me deed for it. This deed was dated October 1, 1915. I had before that time taken up with the different members of the family, Graef, Jim, Gracia, in fact, all of them, unless it were Phy, the advisability of all the family contributing to pay off this indebtedness, telling them that we would have to see that Mr. Green was supported during his lifetime and that it was too bad to let all of this property go, but none of them were in a position to aid in this purpose."

In the case at bar the complainant did not tender

either before suit or in the Bill of Complaint to pay back to the defendant the moneys he had expended in discharging the liens against the property and we insist that the bill is fatally deficient in this regard. From an exhaustive examination of the authorities upon this question we find that the Courts are divided as to whether or not it is necessary to make a tender and offer to place the defendant in statu quo before bringing the action or if it is sufficient to make such a tender and offer in the Bill of Complaint, but all Courts hold that it is necessary to pursue one or the other of these methods. The Bill of Complaint in this case contains no offer of this kind whatsoever and no evidence was introduced that any tender had been made prior to beginning the action.

This honorable Court has held that the complainant must make such tender in the complaint itself.

Alaska and Chicago Commercial Co. vs. Solner, 123 Fed. 855 (cited on page 34 of our original brief).

In the case of Bregogle vs. Walsh (7 C. C. A.), 80 Fed. on page 177 (cited on page 37 of our original brief), the Court of appeals says:

> "To be entitled to a cancellation or rescission of the agreements it was therefore necessary that the appellants, before bringing the suit, should themselves have offered to cancel the agreements, should have returned or offered to return to the trust company the Brefogle notes which had been surrendered, and have repaid or offered to repay to that company, with interest, whatever sums it has paid to Voris or otherwise

had expended. They could not treat such sums as an addition to their debt to the trust company, and so retain a benefit from the agreements which they sought to have rescinded."

See other cases cited in our original brief.

We earnestly insist that the complainant in this case and the other heirs of the said R. E. Green, deceased, are not in a position to claim that they were ignorant of the facts regarding the transfer of the land in controversy to the defendant until more than a year after the death of said R. E. Green, for the reason that all knew that the said R. E. Green was the owner of the home place known as Greenhurst, and that upon his death any inquiry upon their part would have disclosed to them the fact of such transfer. They had the means or knowledge at hand and if they failed to avail themselves of the knowledge which they had and which they could obtain, they were guilty of negligence in not so doing. The facts in this case are very similar to the facts in the case of Pickens vs. Merriam, decided by this Court and reported in the 274 Fed., page 1, and on page 17 this Court says:

"The record of the deeds was open to inspection, and the fact was there apparent touching the date of the deeds and the date of their recording. This of itself was sufficient to induce inquiry why the deeds were not recorded until the day after the death of Mrs. Fensky. The two principal witnesses to the execution of the deeds,

> Parmele and Ferguson, were accessible. Had complainants gone to them, they would have readily obtained the truth in the premises. Instead of prompt action being taken, the estate of Mrs. Fensky was allowed to be closed and the balance of the property on hand to be distributed. In the meantime the grantees in the deeds have, in some instances, sold the lands deeded to them, in others they had paid off mortgages in considerable sums which were upon the property when it came to them, and in most instances they have made improvements and kept up repairs, and have paid the taxes incident thereto."

For other cases covering the points mentioned in this petition for rehearing we respectfully refer the Court to the original brief of appellants filed herein and desire to say that counsel for the appellee in his brief has cited no cases covering the objections which we have made to the pleading in this case and cite this Court to no case or cases in conflict with, or in any manner modify the rules of law which we maintain should govern the Court in this action.

Asking the careful attention of this Honorable Court to the matters set forth in this petition, the same is respectfully submitted.

A. A. FRASER,
Attorney for Appellants.